[Cite as *State v. Britton,* 2010-Ohio-2061.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

DONOVAN BRITTON

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 09 CAA 02 0016

O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 08 CR I 01 0003
JUDGMENT:	Affirmed in part; Reversed in part and remanded
DATE OF JUDGMENT ENTRY:	April 28, 2010

APPEARANCES:

For Plaintiff-Appellee

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Wise, J.

{¶1} Defendant-appellant Donovan L. Britton appeals his sentence and conviction on charges of aggravated murder, murder and aggravated burglary entered in the Delaware County Court of Common Pleas following a trial by jury.

{¶2} Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} At approximately 8:00 or 9:00 a.m. on December 26, 2008, Appellant Donovan Britton appeared at the door of Mark Horn's home located in a rural part of Delaware County. Horn's roommate, Dylan Massey, answered the door, and was asked if a "timely old hippie guy" lived there. Massey said yes but that he was not around. Appellant Britton left his name and telephone number, which Massey wrote down. Appellant said he would return later that week. Massey gave the note to Horn. (T. at 379-384).

{¶4} A couple hours later, Appellant returned. This time Horn let him in and they sat down and talked for about 20 minutes. Massey joined them for five or ten minutes. Upon leaving, Appellant stated he would be back later that week. (T. at 383-386). According to Massey, there did not appear to be any apparent tension between Appellant and Horn at that time. (T. at 444).

{¶5} The next morning Massey awoke to the sound of Horn screaming for help. Massey put on his glasses and went to Horn's room, where he saw Appellant on top of Horn holding him down. (T. at 386-390). Massey stated that he heard Horn ask Britton "[w]hy are you doing this?" to which Britton responded "you know why." (T.

at 457). Massey did not see any blood or injuries at this time, and did not see a knife. (T. at 393-394).

{¶6} Massey stated that he grabbed Appellant by the neck and pulled him off of Horn. As Horn fled, Appellant grabbed his hair and pulled some out. Massey heard Horn, who did not have a vehicle or a telephone, run out the front door of the house and scream for help. (T. at 303-304, 388-394).

{¶7} After Horn left, Massey and Appellant continued wrestling. Massey punched Appellant repeatedly and Appellant tried to grab Massey by the neck. When Appellant tried to run for the front door, Massey tackled him into the doorway. They continued struggling out onto the front porch, where Massey punched Appellant several more times. Appellant eventually broke free and ran for his car, which was parked in the driveway. (T. at 395-397).

{¶8} Horn, injured and bleeding, ran to the house of Ken and Seri Bartow, his closest neighbors, where he entered their kitchen and was met by Michael Phinney, Seri Bartow's brother who lived with them. (T. at 481, 487). Horn told Phinney that he had been stabbed by someone named "Donovan". (T. at 483). Phinney called 9-1-1. (T. at 482). While Phinney was on the phone with the 9-1-1 operator, Ken and Seri Bartow asked Horn what had happened to him and who had stabbed him. (T. at 483, 488, 505-511). Horn told Bartow that he had been stabbed by Donovan, that he thought Donovan lived in Mansfield and that he stabbed him out of revenge. Id. Horn also informed Bartow that Donovan drove an older Honda and that he, Horn, had broken out the window on his car on his way to Bartow's house so that the police would have an easier time tracking the vehicle. Id. Additionally, Horn handed Bartow

an envelope containing $200.00 in cash and asked him to keep the money. (T. at 515). Bartow stated that Horn looked deathly by that time. (T. at 525).

{¶9} The 9-1-1 operator asked Phinney to ask Horn who stabbed him, so Bartow and his wife relayed to Phinney the information that Horn gave them. (T. at 511, 526). The 9-1-1 operator said to put pressure on the wound. Bartow stated that he tried to put a towel on the wound, but Horn kept pushing it away, saying that it hurt, and that he thought a piece of the knife had broken off and was still inside the wound. (T. at 513).

{¶10} The first Sheriff's deputy on the scene asked Horn who had stabbed him, to which Horn replied "Donovan." The deputy attempted to get more information from Horn, but Horn stopped responding. (T. at 537-538). The second deputy on the scene was trained as a first responder. He testified that while Horn was in pain, he was lucid. He stated that blood was seeping from Horn's wound, but not profusely. The deputy put a bandage on the wound and Horn said that the pressure hurt, that it felt like something was in the wound. (T. at 632-633). Horn died from internal bleeding later that morning. (T. at 680-690, 907).

{¶11} After Horn was taken from the Bartows' house, Ken Bartow noticed a large sledge axe with blood on it sitting on his front porch, which he surmised had been brought over by Horn. (T. at 519-520). There were automobile glass fragments on the axe and glass fragments were found in Horn's driveway. (T. at 542, 971).

{¶12} Upon searching Horn's house, deputies found a knife sheath and a broken knife handle, both Renegade brand, on the floor in Horn's sitting room. (T. at 592, 599-600). Although it was believed that the knife blade was still inside Horn, no

blade was found during the autopsy. As a result, deputies returned to Horn's house the next day with a metal detector and searched outside and inside before finally locating the blade under some furniture. (T. at 425-428, 606-607, 635-638, 653-654).

{¶13} Delaware Sherriff's detectives learned Appellant Britton's identity and that he was living with his girlfriend in Mansfield. (T. at 908-913). This information was provided to the Richland County Sherriff, who eventually located Appellant at the home of his girlfriend's sister. (T. at 879-882). Upon arrest, deputies searched Appellant's car and noticed that the driver's side window was broken out. (T. at 947).

{¶14} No prints were found on any of the evidence collected, including the knife handle, sheath, and blade. (T. at 809). Additionally, Horn's blood was not found on any of Appellant's clothing. (T. at 774). Although blood was found on the sleeve of Appellant's coat, it only contained Appellant's DNA. (T. at 757). There was no foreign DNA in Horn's fingernail scrapings. (T. at 755). Appellant's DNA was not identified on the knife handle or blade. (T. at 755). Horn's DNA was, however, found in a blood stain on the driver's seat of Appellant's car, along with another unknown individual. (T. at 751, 753). Finally, blood stains on Massey's pajama pants contained only DNA from Horn and Massey. (T. at 751).

{¶15} Detectives with Delaware County Sheriff's Department went to Mansfield to interview Appellant shortly after his arrest. During the interview, Appellant placed himself at the scene of the crime, calling the victim by his name, Mark. (T. at 918-922).

{¶16} On January 25, 2008, Appellant was indicted on one count of aggravated murder with prior calculation and design, in violation of R.C. §2903.01(A), one count of aggravated murder during a kidnapping or aggravated

burglary, in violation of R.C. §2903.01(B), one count of murder, in violation of R.C. §2903.02(A), one count of felony murder, in violation of R.C. §2903.02(B), one count of kidnapping, in violation of R.C. §2905.01(B)(2), one count of aggravated burglary inflicting serious physical harm, in violation of R.C. §2911.11(A)(1), and one count of aggravated burglary with a deadly weapon, in violation of R.C. §2911.11(A)(2).

{¶17} A jury trial in this matter commenced on January 13, 2009.

{¶18} On January 16, 2009, the jury returned guilty verdicts on all counts.

{¶19} By Judgment Entry filed January 27, 2009, the trial court merged the two aggravated murder counts and merged the kidnapping into the aggravated burglary counts pursuant to R.C. §2941.25. The trial court then sentenced Britton to 30-years-to-life for aggravated murder, 15-years-to-life on each murder count, and 10 years for each aggravated burglary. The trial court set each term to run concurrently, for an effective sentence of 30-years-to-life.

{¶20} Appellant now raises the following assignments of error on appeal:

ASSIGNMENTS OF ERROR

{¶21} "I. BRITTON'S CONFRONTATION RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED BY THE ADMISSION OF HEARSAY STATEMENTS BY HORN.

{¶22} "II. THE TRIAL COURT ERRED BY FAILING TO MERGE BRITTON'S CONVICTIONS FOR MURDER AND FELONY-MURDER INTO THE AGGRAVATED MURDER COUNT, AND BY FAILING TO MERGE BRITTON'S TWO AGGRAVATED BURGLARY CONVICTIONS."

I.

{¶23} In his first assignment of error, Appellant argues that the trial court allowed inadmissible hearsay into evidence. We disagree.

{¶24} Appellant argues that it was error for the trial court to allow into evidence the out of court statements made by the victim to his neighbors and responding police officers identifying him as Horn's attacker. Such statements were also relayed by the Bartows to Phinney to the 9-1-1 operator. This 9-1-1 recording was played during trial.

{¶25} Appellant also challenges the admissibility of the out of court statements made by the victim stating that Appellant's motivation was revenge based on his belief that Horn was the reason he had been sent to prison on an unrelated drug charge.

{¶26} Appellant argues that the admission of these statements violated his right to confront and cross-examine witnesses testifying against him as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution as set forth in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177.

{¶27} Initially, we must determine whether the statements made by Horn to Phinney and Bartow were testimonial. *Crawford*, 541 U.S. at 52. Improper admission of testimonial statements may violate the Sixth Amendment right to confrontation. Id. at 68. The *Crawford* court, however, declined to comprehensively define the term "testimonial," opining, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Id. (Emphasis added.)

{¶28} In the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224, the United States Supreme Court distinguished between police interrogations that concern an ongoing emergency and those that relate to past criminal conduct. In considering whether the statements in these cases were testimonial, the court formulated the primary purpose test: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Id. at 822.

{¶29} In the instant case, Horn's statements to his neighbors identifying Appellant as his attacker were not made in response to questions posed by law enforcement but instead were made to his neighbors who were trying to determine what had happened to him, who caused his injuries and whether that person was still around. These statements were made prior to the police arriving on the scene. We therefore find that these statements were non-testimonial in nature.

{¶30} With regard to the statement made to the first deputy on the scene stating that "Donovan" stabbed him in response to the deputy's inquiry, we find that such statement was testimonial.

{¶31} With regard to whether these statements were inadmissible under the hearsay rule, we find that Evidence Rule 803 allows hearsay statements to be admitted into evidence in the following situations:

{¶32} "(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

{¶33} "(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶34} In this case, Horn had just been stabbed minutes before he ran bleeding to the Bartows' house. He was suffering, bleeding and in pain. He was, in fact, dying when he told Phinney, the Bartows and the deputy that Appellant was the person who stabbed him. The evidence reflects that Horn's statements were made almost immediately after the stabbing, while he was still suffering from his injury, and while he was still under the stress of such a startling event. As such, his statements were not the product of reflective thought. See *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235. Thus, the evidence supports admissibility of Horn's statements under Evid.R. 803(1), as a present sense impression, and/or Evid.R. 803(2), as an excited utterance.

{¶35} Assuming arguendo that these statements did not fall within the exceptions to the hearsay rule, we find that any error in the admission of such hearsay statements was harmless. Likewise, we find that the statement made to the deputy identifying Appellant was harmless error.

{¶36} The admission or exclusion of evidence lies in the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or

unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3.

{¶37} The test for determining whether the admission of inflammatory or otherwise erroneous evidence is harmless and non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. *State v. Riffle,* Muskingum App. No. 2007-0013, 2007-Ohio-5299 at ¶ 36-37. (Citing *State v. Davis* (1975), 44 Ohio App.2d 335, 347, 338 N.E.2d 793). Error is harmless beyond a reasonable doubt when the remaining evidence constitutes overwhelming proof of the defendant's guilt. *State v. Williams* (1988), 38 Ohio St.3d 346, 349-350, 528 N.E.2d 910.

{¶38} In the case at bar, independent evidence of the Appellant being the attacker was introduced to the jury through both the testimony of the victim's roommate Massey and Appellant's own girlfriend. The record contains sufficient evidence providing a basis for a finding that Appellant was the attacker in this case. Physical evidence in the form of the victim's blood and DNA found on Appellant's car seat also supports the finding that Appellant was Horn's attacker.

{¶39} We therefore find no prejudice to Appellant by the admission of the 9-1-1 tape and the statements of Bartow and Phinney. *State v. Hicks,* supra 2008-Ohio-3600 at ¶ 71; *State v. Nichols* (1993), 85 Ohio App.3d 65, 72-73, 619 N.E.2d 80, 85-86. Accordingly, we find any error in the admission of the statements made by Horn to Phinney and Bartow was harmless.

{¶40} Accordingly, Appellant's first assignment of error is overruled.

II.

{¶41} In his second assignment of error, Appellant claims that the trial court erred in failing to merge convictions for purposes of sentencing. We agree.

{¶42} Specifically, Appellant claims the trial court should have merged the aggravated murder convictions and further should have merged the convictions for murder and felony-murder into the aggravated murder conviction for purposes of sentencing.

{¶43} The State of Ohio does not challenge this assignment of error.

{¶44} Upon review, while we find that the aggregate sentence will not change because the trial court did not impose a sentence on the second aggravated murder charge and further ordered the sentences on the remaining counts to run concurrent to the Aggravated Murder charge, we find that the Sentencing Entry is in error and that this matter must be remanded for re-sentencing.

{¶45} Appellant's second assignment of error is sustained.

{¶46} For the foregoing reasons, the judgment of the Court of Common Pleas, Delaware County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

By: Wise, J.
Gwin, P. J., and
Delaney, J., concur.

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JUDGES

JWW/d 46

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
DONOVAN BRITTON	:	
Defendant-Appellant	:	Case No. 09 CAA 02 0016

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

Costs assessed to appellant.

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JUDGES